HOTEL ISTANA

v.

NOR AZAM BAHARIN

INDUSTRIAL COURT, KUALA LUMPUR
TAN YEAK HUI, CHAIRMAN
AWARD NO. 924 OF 2005 [CASE NO: 13/4-1658/04]
5 MAY 2005

LABOUR LAW: *Industrial Court - Procedure - Demise of claimant - Reference under s. 20(3) Industrial Relations Act 1967 - Claimant's estate - Locus standi - Whether could represent claimant and proceed with hearing - Whether Industrial Court could hear case on merits - Whether reference abated upon death of claimant - Industrial Relations Act 1967, ss. 20(3), 26, 29(a), 30(5)*

The reference under s. 20(3) Industrial Relations Act 1967 ('the Act') herein stood poised for hearing before the learned Chairman of the Industrial Court when the claimant suddenly passed away. Thereupon, the claimant's father sought to represent the claimant's estate and proceed with the hearing. The company protested, arguing, on the authority of *Thein Tham Sang v. United States Army Medical Research Unit & Anor* [1983] 1 CLJ 240 ('*Thein's* case'), that the legal representative/administrator of a workman's estate could not appear at the Industrial Court in proceedings under s. 20(3) of the Act. It was not in dispute that in *Thein*'s case, the Federal Court, affirming the High Court and upon a 'narrow' interpretation of s. 29(a) of the Act ruled that a claim under s. 20(3) of the Act is a claim personal to the non-union workman, and that it would abate upon his death. The apex court's ruling notwithstanding, the learned Chairman, on the facts and in the circumstances before him, deemed it wise and necessary to continue to dwell on the issue of whether a workman's estate could claim on behalf of the deceased workman, and embarked, therefore, upon a re-examination of the *ratio decidendi* of the High Court and the Federal Court in *Thein*'s case and asked himself the following question, namely, whether the claimant's estate had the *locus standi* to claim on behalf of the claimant, and if so whether it could adduce evidence to convince the Industrial Court to rule in its favour.

Held (for the company):

[1] This court would disagree with *Thein*'s case that a claimant's claim would abate upon his death. Whilst it is true that the court cannot re-instate a dead man even if evidence can be produced to conclude that the dismissal was without just cause or excuse, the court can still mitigate the hardship, in appropriate cases, by awarding monetary compensation *in lieu* of re-instatement. (p 250 a-c)

[2] Since the dispute under a s. 20 reference is one involving the personal capacity of the workman as distinct from his status or capacity as a member of a union, the deceased workman should all the more be allowed to continue with his claim through his personal representative upon his death. The demise of the deceased worker should not provide the company with an unfair procedural advantage so as to deny the worker's estate of their just and lawful claim for the alleged unfair dismissal of the deceased. The deceased worker's estate, therefore, should be allowed to bring forth whatever evidence that they may have in support of their claim despite the absence of the deceased worker as a witness in court. (p 249 d-g)

[3] If the personal representatives, heirs or successors of the deceased workman were not barred from pursuing the deceased workman's claim in the the labour court and the civil court – as the High Court in *Thein's* case seemed to indicate – it would appear illogical why the deceased workman's estate should be barred or denied the right to claim monetary compensation in lieu of re-instatement in the Industrial Court just because he is no longer around to prove his case. The Industrial Court is specially created to regulate the relationship between employers and employees and it would be incomprehensible for an average workman to be referred to the civil court to make his monetary claim in lieu of re-instatement. (p 250 d-f)

[4] With respect, this court would disagree with the Federal Court's reasoning for dismissing the appeal. (p 253 c)

[4a] Whilst it is true that the word "party" in s. 29(a) of the Act does not "include" the legal representative or administrator of the estate of the deceased workman, the word, likewise, does not "exclude" such legal representative or administrator. Since Parliament did not specifically "exclude" the deceased workman's legal representative or administrator, then, bearing in mind the nature and purport of the Act, which is to advance social justice and provide a more even playing

field to the workers, the *'contra preferentum'* rule should be applied in the reverse. It follows that, in a situation such as here, where there is an ambiguity or uncertainty in a document, the most appropriate interpretation would be to construe it in favour of the party whom Parliament had sought to assist in the uneven playing field prevailing before the creation of the Act. Further, had Parliament intended a narrower interpretation, the legislators would have used the word "must" instead of "may" in s. 27(i) of the Act. By such absence of the mandatory effect of "must", the inevitable conclusion could only be that Parliament had never intended that the deceased worker must either appear "in person" or "nothing at all". (pp 253 d-h & 255 a)

[4b] The maxim *actio personali monitor cum persona* – a person's right of action dies with the person – is an old English law principle which though traceable to the 15th century, probably did no more than state in Latin a long established principle concerning torts such as assault and battery. Be that as it may, the maxim is defective in its effect (resulting in the passing of the Law Reform (Miscellaneous Provisions) Act 1934 and some amendments to the Fatal Accidents Act 1948) and it is arguable whether our Legislators had intended the maxim to apply in the relationship governing workers and employers in this country. Parliament, in all probabilities, would not have adopted the maxim. If a personal representative, heir or successor of a deceased workman could have a right of action in the civil court, it is unlikely that Parliament would intend to prevent them from pursuing their claim in the Industrial Court. (pp 255 d-h & 256 a-b)

[5] This court is nonetheless bound by the decision of the Federal Court in *Thein's* case and would, with much reluctance, strike off the claimant's case. By this act of striking out the claim without the benefit of hearing fully the evidence of the claimant's personal representative, this court has to live with the conscience that justice may have been denied to the deceased worker because of a possible misconstruction of a provision in the statute. (p 256 c-f)

[Claim struck off.]

Case(s) referred to:
Bharat Singh v. New Delhi Tuberculosis Centre [1986] 2 Sec New Delhi ***(refd)***
Cableview Services Sdn Bhd v. Mazlan Salim & Yong Lian [2000] 3 ILR 109 ***(refd)***
Dr Dutt v. Assunta Hospital (Federal Court Civil Appeal No. 276 of 1980) ***(refd)***
Kesatuan Kebangsaan Pekerja-pekerja Ladang v. Ladang Kundang Pengkalan Kundang, Rawang [1981] 1 ILR 33 ***(refd)***
Linatex Rubber Products Sdn Bhd v. Parenthaman Moothusamy [1996] 2 ILR 1734 ***(refd)***
Northam v. Barnet Council [1978] 1 WLR 228 ***(refd)***
People's Mirror Bre Sdn Bhd v. Chew Hock Guan [1990] 1 ILR 242 ***(refd)***
Talasiah Mohd Kamaruzaman & Othman v. ASA Industries (M) Sdn Bhd [2003] 3 ILR 922 ***(refd)***
Thein Tham Sang v. The United States Army Medical Research Unit & Anor [1983] 1 CLJ 240; [1983] CLJ (Rep) 417 ***(refd)***
Thein Tham Sang v. The United States Army Medical Research Unit & Anor [1982] CLJ 500; [1982] CLJ (Rep) 820 ***(refd)***

Legislation referred to:
Industrial Relations Act 1967, ss. 2, 20(3), 26, 27(i) (c), (d), 29(a), 30(5)

Employment Protection (Consolidation) Act 1978 [UK], r. 2, sch. 12

For the company - HC Yong; M/s Zaid Ibrahim & Co
For the deceased worker's estate - father of deceased

AWARD

Via Ministerial reference dated 1 June 2004 this dispute over the alleged unfair dismissal of Encik Nor Azam b. Baharin by Hotel Istana was referred to the Industrial Court for an award under s. 20(3) of the Industrial Relations Act 1967.

The matter was first called for mention on 12 October 2004. The company was represented by Mr. H.C. Yong whilst the claimant was represented by Ms Nur Hakimah bt. Mohd. Counsel for the claimant, Ms Nur Hakimah informed the court that her client had passed away on 4 July 2003. The deceased's claimant's father was in court purporting to claim on behalf of his deceased son's estate produced a death certificate confirming his son's death. Ms Nur Hakimah informed the court that the deceased's claimant's estate wished to pursue the claim by applying for letters of administration and substituting the administrators for the deceased claimant. Whereupon the court directed her to address the court as to whether the Industrial Court has the jurisdiction to entertain the claims by the administrators of the deceased claimant's estate. The court set 20 October 2004 for the deceased claimant's counsel to present her submission.

When the case was called-up for hearing of deceased claimant's counsel submission, Ms Nur Hakimah was absent in court. Only the deceased claimant's father was present. No reason was given for Ms Nur Hakimah's absence in court. Deceased claimant's father was left without counsel and tried to persuade the court that his deceased son's estate should be given the right to pursue the claim. He further informed the court that there was some arrangement between his deceased son prior to the latter's death and the company's human resources department about some proposals for compensation for the alleged unfair dismissal. The deceased claimant's father was however unable to support those assertion with any acceptable evidence to the court.

The court then invited company's counsel Mr. H.C. Yong to submit on the company's case and later to support it with written submission. The thrust of Mr. Yong's argument centres on the Federal Court's decision of *Thein Tham Sang v. The United States Army Medical Research Unit & Anor* [1983] 1 CLJ 240; [1983] CLJ (Rep) 417. Learned counsel contends that the Federal Court held that there is nothing in the Industrial Relations Act 1967 that allows a legal representative or administrator of the deceased claimant's estate to be substituted for the deceased claimant in the proceedings in the Industrial Court. The Federal Court further held that proceedings under s. 20(3) Industrial Relations Act 1967 are a claim personal to the non-union workman and that it abates on his death and cited the maxim *"actio personalis moratur cum persona"* as applicable to the facts of the case.

Learned counsel for the company further submitted the following cases decided by the Industrial Court in support of the Federal Court decision and contends that these s. 20(3) Industrial Relations Act 1967 references have been struck off on the grounds that the claim abates upon the claimant's death:

a) *People's Mirror Bre Sdn Bhd v. Chew Hock Guan* [1990] 1 ILR 242.

b) *Linatex Rubber Products Sdn Bhd v. Parenthaman Moothusamy* [1996] 2 ILR 1734

c) *Cableview Services Sdn Bhd v. Mazlan Salim & Yong Lian* [2000] 3 ILR 109

d) *Talasiah Mohd Kamaruzaman & Othman v. ASA Industries (M) Sdn Bhd* [2003] 3 ILR 922

Learned counsel for the company further submits that a s. 20(3) Industrial Relations Act 1967 reference is personal in nature and is a claim for re-instatement and hence the claimant cannot be substituted. He further adds that only the claimant can be re-instated and not his administrators. Counsel further argued that although compensation can be granted *in lieu* of re-instatement, this is only so if the remedy of re-instatement is granted in the first place but considered not appropriate under the circumstances of the case by the courts. Compensation, can only be granted *'in lieu'* of re-instatement and if re-instatement is impossible no question of compensation would or should arise, so asserts the learned counsel.

Balancing his argument, learned counsel for the company cited a case in which the Industrial Court heard merits of a complaint notwithstanding the dismissal of the claimant. The Industrial Court was asked to adjudicate on a reference of non-compliance by the company with regards to retirement benefits in the case of *Kesatuan Kebangsaan Pekerja-pekerja Ladang v. Ladang Kundang Pengkalan Kundang, Rawang* [1981] 1 ILR 33. In the course of the proceeding the company raised a preliminary objection that the employee had passed away and therefore the agent who is the union representing the employee's interest had no *locus standi* to act further. The Industrial Court dismissed the preliminary objection on the following grounds:

a) Complaint was lodged by union prior to employee's death over an issue that arose during the life-time of the employee.

b) Union was effectively seeking a declaration as to whether the employee had a valid claim against the company.

c) Employee's death did not alter the status that the parties to the suit were still the union and the company.

Learned counsel distinguished this case with the argument that this is a collectiveagreement matter about retirement benefits and that in a non-compliance application the Industrial Court's duty is one of enforcement to determine the obligation of the parties. It is further contended by learned counsel that a s. 20 claim always remains the right of the individual employee and not the union. A s. 20 claim is not merely a question of enforcing particular provision within given documents but full facts and evidence has to be disclosed in order for the Industrial Court to properly adjudicate and without the presence of the claimant it would be not possible and highly improbable to arrive at a reasoned decision.

Evaluations And Findings

After hearing the submissions from learned counsel for the company and the deceased claimant's father and after perusing through the written submission by Mr. H.C. Yong and reviewing the authorities the court hereby expresses its views herein below:

What are the issues for this court's considerations? Broadly it is as follows:

a) Has the deceased worker estate the *locus standi* to claim on behalf of the deceased worker or can a party be allowed to be substituted from the deceased worker in the proceedings.

b) If the answer is in the positive has the deceased worker's estate or substituted party adduced sufficient evidence to convince the court to rule in its favour.

Industrial Court's View in 1973

About 32 years ago, a seemingly ordinary dismissal case came before another division of the Industrial Court. It was tried before the then learned Chairman Tuan K.A. Menon, in the case of *Kumpulan Gutherie Sdn Bhd v. Sukamari Amma N. Menon* and in his Award No 33/73, the learned Chairman made a historic decision on the law pertaining to the substitution of the deceased worker by his widow in the claim against the employer. He said on p. 2 of the award:

> Before the substituted party was introduce into reference the first point that arose for the court's consideration was whether the death of the original complainant ie, the deceased abated the reference altogether or whether it should nevertheless proceed to hear the merits of the dispute which gave rise to the reference. The general principle at Common Law is that the death of the servant puts an end to the contract of service, but any right of action vested in the deceased during his life-time survives for the benefit of the deceased's personal representatives-subject to the provisions of the Limitation Ordinance. For example the deceased servant's personal representatives can sue for and recover any arrears of wages due to the deceased-servant from his employer. In the present case the primary issue on the pleading's for the court's determination was whether the deceased was dismissed for good and just cause. Therefore as soon as the court was informed of the deceased's death it had to bear in mind the possibility that the facts of the dispute might lead to the conclusion that the company did not have good cause to dismiss the deceased. If that was so, then the question of an award for compensation would arise, since re-instatement was no longer a remedy. By analogy to the position under the Common Law, the deceased's personal representative would be entitled to the benefit of an award and that right therefore had to

> be safeguarded. Encik Gomez informed the court that he had been instructed that the deceased had left a will under which his widow was appointed Executive. However, there is no requirement in the Industrial Relations Act or Rules on Regulation as a pre-condition to substitution and in pursuance of s. 29(a) of the Act the court directed that the name of the deceased's widow (being the most obvious and suitable person for the purpose) be substituted in place of her late husband's in the title thereto so that the merits of the dispute could be examined. Counsels for both parties assented to this course and prior to the start of the hearing Rules 12 & 13 of the Industrial Court Rules 1967 relating to substitution of parties were complied with. Both parties gave their consent to the court proceedings with the hearing in the absence of the workers panel member.

At the conclusion of the hearing, the learned Chairman found against the company and ordered compensation to be paid to the substituted party "as re-instatement was not possible because of the death of the workman". The learned Chairman on a closer examination of the award appeared to be more concerned about the merits of the claim rather than the parties to the claim. It probably would not be too inacurate to infer that the learned Chairman was guided and influenced more by s. 30(5) than by the formal pleadings.

High Court's View In 1982

Answers to the above questions whether the deceased workers' estate has *locus standi* to claim on behalf of the deceased workman appears to be found in the *ratio decicendi* of his Lordship Hashim Yeop Sani J (as he then was) in the leading case of *Thein Tham Sang v. The United States Army Medical Research Unit & Anor* [1982] CLJ 500; [1982] CLJ (Rep) 820. His Lordship said:

> Section 20 of Industrial Relation Act must be construed within the four corners of our statute. Section 20 of the Act as I have said elsewhere (see [1981] MLJ 304) is a provision especially incorporated into our Act to provide relief to workmen who are not members of any union who consider themselves to have been dismissed without just cause or excuse. As the section clearly says a claim under a s. 20 is a claim 'personal' to the claimant. The Industrial Court cannot re-instate a dead workman. Any other reliefs the Industrial Court may give are merely incidental or ancillary to the main relief asked for. Thus the main claim under s. 20 is personal in nature and the action abates with the death of the claimant.

What did his Lordship have in mind when he said that s. 20 is personal in nature. It has been said that his Lordship made it clear that s. 20 is a provision specially grafted into the Industrial Relations Act 1967 to provide relief to workman who are not members of any trade union and a means for non-union members specially to seek relief in a dispute between him and his employers *"per se"* and not, those which involve the employer and the union espousing and championing the causes and rights of its members as is provided under s. 26, Industrial Relations Act 1967.

This court agrees with his Lordship's opinion that s. 20, Industrial Relations Act 1967 provides a workman a right to pursue his claim to seek relief between himself and his employer ie, between the individual workman and his employer as distinct from those disputes arising between employer and trade union (in which the workman is a member of). Hence under a s. 20 claim, a workman can proceed in his own 'personal' capacity in a dispute personal to himself as opposed to under the union as a whole (in which he is a member of).

It is the humble opinion of this court that since the dispute under s. 20 reference is one involving the personal capacity of the workman as distinct from his status or capacity as a member of a union the deceased workman should all more be allowed to continue with his claim through his personal representatives upon his death. The fact that the deceased workman is not in court to give evidence to support his allegation or contention of his alleged unfair dismissal, is no good reason why the company need not be present in court to prove their case that the dismissal was fair and with just cause. In a s. 20 reference other than a claim for constructive dismissal it has been the practice and the procedure has been for the company to justify its action in court that the dismissal was fair and with just cause. The demise of the deceased worker should not provide the company an unfair procedural advantage to deny the deceased worker's estate of their just and lawful claim for the alleged unfair dismissal of the deceased. The deceased worker's estate should be allowed to bring forth whatever evidence they may have in support of their claim despite the absence of the deceased worker's presence as a witness in court.

His Lordship stated that the main claim under a s. 20 reference is for re-instatement and that all other reliefs are merely incidental or ancillary. This court agrees with his Lordship opinion on the above but wishes to express its opinion on the incidental and ancillary relief mentioned by his Lordship.

It is without any doubt the legislators of the Industrial Relations Act 1967 intended to arm the Industrial Court with powers to re-instate workers wrongfully dismissed without just cause and excuse as a primary relief and that all other reliefs are ancillary and incidental. It should be noted that the reality in the current economic situation is that over 90% of all claims although pleaded for re-instatement end up in monetary considerations. This court humbly disagrees with his Lordship's contention that the claimant's claim abates upon death. This court whilst agreeing that the Industrial Court cannot re-instate a dead man even if the evidence can be produced to found that the dismissal was without just cause and excuse hold the view that the court can still mitigate the hardship (in appropriate cases) by awarding monetary compensation *in lieu* of re-instatement. Applying the reality test in a majority of cases the claimant's remedy can be satisfied (if the alleged dismissal without just cause and excuse can be proven) with monetary compensation.

His Lordship further states in *Thein Tham Sang v. The United States Army Medical Research Unit & Anor* [1982] CLJ (Rep) 820 at p. 823 that "it seems clear on the authority that the right to sue for money or equivalent of money due to a deceased workman whilst the case was pending before the Labour Court survives to the heirs, successors and legal representatives and they can take action by way of a suit in a civil court." It is the humble opinion of this court that if the personal representative heirs or successors of the deceased workman are not barred from pursuing the deceased workman's claim in the other courts it would appear illogical to an average workman why his estate would be barred from or denied the right to claim for monetary or its equivalent *in lieu* of re-instatement in the Industrial Court just because he is no longer around to prove his case. The Industrial Court is specially created by Parliament to regulate the relationships between the employer and the employee and it would be incomprehensible for an average workman to be referred to another civil court to make his monetary claim *in lieu* of re-instatement just because of technicalities.

Federal Court's View In 1983

The decision of the late Justice Hashim Yeop Sani J in the High Court was taken on appeal to the Federal Court. The Federal Court unanimously endorsed the decision of his Lordship at the first instance and this court intend to examine the *ratio decidendi* of the Federal Court through the leading judgment of George Seah FJ His Lordship referred to the point raised by the appellant (deceased worker's husband) about a provision in

the U.K. Employment Protection (Consolidation) Act 1978 wherein there are express provisions dealing with situations where the workman dies when his case is pending in an Industrial Tribunal. Rule 2 of Schedule 12 of the 1978 Act provides that "where an employee or employer has died, tribunal proceedings under any of the relevant provisions may be instituted or continued by a personal representative of the deceased employee". In such a case any award made by the Industrial Tribunal shall be in such term and shall be enforceable in such manner or as may be provided by regulations made by the Secretary of State; r. 3(a) and r. 10 reads.

> Where an employee has died then unless an order for re-instatement or re-engagement has already been made Section 69 shall not apply and accordingly if Industrial Tribunal finds that the grounds of the case shall be treated as falling within Section 68 (2) as a case which no order is made under Section 69.

His Lordship states that as no parallel or similar provision are found in our Industrial Relations Act 1967 or in the Rules the English provision above does not apply here and hence the deceased worker's estate cannot proceed or continue with its claim on behalf of the deceased workman.

It is the humble opinion of this court that it is not disputed there are no provisions in our Industrial Relations Act 1967 and its Rules similar to the English 1978 Act and hence it would appear there is no basis for our courts to follow the English statute other than "at best offer only guidelines". To get to the root of the matter, this court poses four questions for concerned parties to reflect upon:

a) Was it the intention of Parliament to disallow the estate of the deceased workman to claim against the employer (even though the deceased worker's estate may be able to furnish evidence to support the case without the presence of the deceased).

b) Did the over zealousness of strict construction in their interpretation of the provision of Section 20 frustrate the intention of Parliament to encourage the Industrial Court to act according to equity, good conscience and the substantial merits of the case.

c) Was it an oversight of the legislators in failing to specifically provide for the deceased workman's estate the right to claim in an era about 40 years ago where the primary concern of Parliament then was to ensure job security for the workers?

d) Would social justice be fully served (which was the main purpose for the creation of the 1967, Industrial Relations Act) by denying the deceased worker's estate from making a claim upon the death of the worker.

The direction by the then learned Chairman of the Industrial Court Tuan K.A. Menon to substitute the deceased's widow in place of her late husband's in the title thereto under s. 29(a) Industrial Relations Act 1967 was not challenged by the counsel for the company. As both counsels assented to the substitution made by the learned Chairman in pursuance to s. 29(a) Industrial Relations Act 1967 the Industrial Court then did not give much reason to support the substitution other than stated that the deceased's widow was " the most obvious and suitable person for the purpose". This direction of the Industrial Court to order any party to be substituted under s. 29(a) Industrial Relations Act 1967 remained unchallenged for 10 years until the case of *Thein Tham Sang v. The United States Army Medical Research Unit & Anor* [1983] 1 CLJ 240; [1983] CLJ (Rep) 417 brought the provision under the microscopic examination of the Federal Court. His Lordship George Seah FJ had this to say "'Party' with reference to a trade dispute means a trade union or workman acting for all or any number of its members in the trade dispute, or an employer acting for himself in the trade dispute or a trade union of employers acting for all or any members of its members in the trade dispute (see s. 2)." Having further regard to the definition of "trade dispute" and "workman" in s. 2, thereof we are of the view that the word "party" in s. 29(a) of the Act does not include the legal representative or administrator of the estate of the deceased workman. His Lordship went on to add that:

> Support for this is found in the provision of s. 27(i)(c) and (d) of the Act which read as follows:
>
> Section 27(i) A party to a trade dispute or to a reference to the court under a s. 20(3) **may** (emphasis added) at proceedings before the Court:
>
> a)
>
> b)
>
> c) Where the party is a workman (in proceedings under Section 20(3) appear himself personally
>
> d) Where the party is a trade union or an employer or a workman (in proceedings under Section 20(3) be represented with the permission of the President or the Chairman by an advocate ... .

His Lordship concluded that "if the legal representative or administrator of the estate of the deceased workman were allowed to appear at the Industrial Court in proceedings under s. 20(3) of the Act, express provision would be provided for it in the Act. But none was so provided either in the Act or in the Industrial Court Rules 1967. Having regard to the abovementioned facts, we agreed with the learned Judge that proceedings under s. 20(3) of the Act are a claim personal to the non-union workman and that it abated on his death. In short the maxim "*actio personalis moratur cum persona*" applies to the fact of this case. In the result, we dismiss the appeal with cost.

This court begs to disagree with his Lordship on his reasoning for dismissing the appeal and wishes to express its views as follows:

His Lordship stated that the word "party in s. 29(a) Industrial Relations Act 1967 do not "include" legal representative or administrator of the estate of the deceased workman. This court is of the view that the word "party" in s. 29(a) Industrial Relations Act 1967 also does not 'exclude' the legal representative or administrator of the deceased worker's estate. Since Parliament did not specifically 'exclude' the deceased workman's legal representatives or administrator then it is submitted that since the 1967 Act is a piece of legislation proclaiming to advance social justice and to provide a more level playing field to the workers of this country the "*contra proferentem*" rule should be applied in reverse. Hence in a situation such as this where there is an ambiguity or uncertainty in a document the most appropriate and just interpretation would be to construe it in favour of the party in which Parliament had in mind to assist in the uneven or unlevel playing field prevailing before the creation of this enactment.

His Lordship's contention that support for the *narrow* interpretation may be found in the provision of s. 27(i)(c) and (d) of the Industrial Relations Act 1967 which reads as follows:

> Section 27(i): A party to a trade dispute or to a reference to the court under a Section 20(3) **may** (emphasis added) at proceedings before the Court:
>
> c) Where the party is a workman (in proceedings under s. 20(3)) appear himself personally
>
> d) Where the party is a trade union or an employer or a workman (in proceedings under s. 20(3)) be represented with the permission of the President or the Chairman by an advocate

It is with great respect this court is of the view that had Parliament intended a narrower interpretation then the legislations would have used "**must**" (emphasis added) instead of "**may**" (emphasis added) in s. 27(i) to read as follows: A party to a trade dispute or to a reference to the court under s. 20(3) **must** at proceedings before the court:

c) Where the party is a workman (in proceedings under s. 20(3)) appear himself personally

d) Where the party is a trade union or an employer or a workman (in proceedings under s. 20(3) be represented with the permission of the President or the Chairman by an advocate….

It is submitted that the mandatory effect of "**must**" is absent in the provision of s. 27(i) and it gave way to the more liberal and flexible effect of "**may**" (emphasis added). Hence the inevitable conclusion must be Parliament had never intended that the deceased worker must either appear "in person" or "nothing at all".

Inspiration for this contention can be found in the case of *Dr. Dutt v. Assunta Hospital* (Federal Court Civil Appeal No. 276 of 1980). The High Court had ruled in that case that a workman who comes to court for relief and claimed to have been dismissed without just cause and excuse must claim only for reinstatement and on this claim, he either gets an order for reinstatement or nothing at all. This view was over-turned by the Federal Court which applied the 'purposive approach' and allowed compensation to be claimed *in lieu* of reinstatement.

Lord Denning in *Northam v. Barnet Council* [1978] 1 WLR 228 said, "The literal method is now completely out of date. It has been replaced by the approach which Lord Diplock described as the 'purposive approach'. In all cases now in the interpretation of statutes we adopt such a constructive as would promote "the general legislative purpose" underlaying the provision".

In *Bharat Singh v. New Delhi Tuberculosis Centre* [1986] 2 Sec New Delhi the Supreme Court said "Now it is trite to say that acts aimed at social amelioration giving benefits for the have-nots should receive liberal construction. It is always the duty of the court to give such construction to a statue as would promote the purpose or object of the Act. A construction that promotes the purpose of the legislation should be preferred to a literal construction. A construction which would defeat the rights of

the have-nots and the underdog and which would leave an injustice should always be avoided. This section was intended to benefit the workmen in certain cases."

The draftsman of s. 27(i) may or may not have the mathematical precision and acumen with the usage of words as in the league or in the craftsmanship style of the late Lord Denning. The meaning of s. 27(i) may appear to be a bit ambiguous from the choice of words used to express Parliament's intended goal. But if the provision of s. 27(i) is read in its entirety with the whole of the 1967 Act, the crystal clear intention of Parliament with its declared goal of providing social justice to the workers of this country would surface.

His Lordship in the final paragraph of his judgment held that the maxim *"actio personalis monitor cum persona"* applied to the facts of this case.

Again this court with respect would like to express its views as follows:

> It has been held by some quarters that the maxim "*actio personalis monitor* cum *persona*" (a person's right of action dies with the person) is as old as English law itself. Some learned commentator such as Winfield is of the view that "at common law the general rule was that death of either party extinguished any existing cause of action in tort by one against the other. This was due in part to the historical connection of the action of trespass from which much of the law of tort is derived, with the criminal law and in part to the reference often made to the maxim "*actio personalis monitor cum persona*" which though traceable to the fifteenth century probably did no more originally than state in Latin a long established principle concerning torts such as assault and battery of which it was neither the historical cause nor the rational explanation.

The increase in motor accidents in England drew the attention of the British Parliament to the defects of the effects of the above maxim. Before the passing of the English Law Reform (Miscellaneous Provisions) Act 1934, if a negligent driver was killed in an accident in which he himself had caused nothing was recoverable from his estate or his insurers by those whom he had injured. The 1934 Act was passed to provide generally for the survival of causes of action in tort. Similarly the English Fatal Accidents Act 1846 as amended in 1976 also made provision for dependents of those killed in fatal accidents. It is arguable whether our legislators had intended the maxim to apply in the relationship governing the workers and employers in this country. If this court were to hazard a guess it is of the view that Parliament would not have adopted this maxim because as in the words

of the late Hashim Yeop Sani J, "the right to sue for money or equivalent of money due to a deceased workman whilst the case is pending before the Labour Court survives to the heirs successors and legal representatives and they can take action by way of a suit in the civil court." It is humbly submitted that if a personal representative heir or successor of a deceased workman can have the right to actions in the civil court, any obstructions preventing the deceased worker's personal representative heirs or successors from pursuing its claim in the Industrial Court would in the opinion of this court be the last thing Parliament would have intended it to be.

Conclusion And Remedy

Mindful and with respect to the doctrine of *stare decisis* this court is unable to assist the father of the deceased son to make a claim over the alleged unfair dismissal. This court stand bound by the decision of the Federal Court in *Thein Tham Sang v. The United States Army Medical Research Unit & Anor* and with much reluctance struck off the claimant's case as requested by the company's counsel. By this act of striking out the claim without the benefit of hearing fully the deceased worker's personal representative's evidence, this court has to live with the conscience that justice may have been denied to the deceased worker because of a possible misconstruction of a provision in a statute. However, the centuries old practice of the binding effect even if at times stifling, of the doctrine of *stare decisis* must be observed, respected and followed. It is the humble opinion of this court that the judges in the Superior Courts may have misread or misconstrued the intention of Parliament. It is hoped the time has come for the social activists, reformers and all concerned parties to prompt Parliament to debate further this matter so that the true intention of Parliament can be ascertained and if appropriate, review and amend the law accordingly. Further it is hoped that the application of the principles of natural justice be encouraged to roam more freely in the Industrial Court and to assert itself in the manner envisaged by the creator of the Industrial Relations Act 1967.